U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: [redacted] Office: Texas Service Center Date: DEC 13 2000

IN RE: Petitioner: [redacted]

Petition: Immigrant Petition by Alien Entrepreneur Pursuant to § 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(5), and § 610 of the Appropriations Act of 1993.

IN BEHALF OF PETITIONER:

[redacted]

Public Copy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

identifying data deleted to prevent clearly unwarranted

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mary C. Mulrean, Acting Director
Administrative Appeals Office

[redacted]

DISCUSSION: The prior approval of the immigrant visa petition was revoked by the Director, Texas Service Center, and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks classification as an alien entrepreneur pursuant to § 203(b)(5) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. 1153(b)(5), and § 610 of the Appropriations Act of 1993. The director revoked approval of the petition finding that the petitioner failed to establish eligibility on several grounds. Relying on Matter of Izumii, I.D. 3360 (Assoc. Comm., Ex., July 13, 1998), the director found that the structure of the petitioner's investment agreement, consisting of a down payment with additional annual payments scheduled over a six-year period, did not constitute a qualifying investment. The director also found that the structure of the petitioner's investment did not constitute a qualifying "at risk" investment for the purposes of this proceeding finding that the investment agreement's provisions for reserve funds, escrow funds, and guaranteed returns prior to completion of the investment rendered those sums not acceptable as a part of the minimum capital investment; that the redemption agreements negated the at-risk element; and that the security interest of the promissory note was not perfected as required. The director further found that the petitioner failed adequately to document the source of his funds and thereby failed to establish that the funds were obtained through lawful means.

On appeal, counsel for the petitioner broadly argued that the decision in Matter of Izumii, supra, was a "faulty analysis" of the enterprise and that the petition is qualifying under the pertinent regulations.

§ 203(b)(5)(A) of the Act provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) which the alien has established,
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> (ii) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
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> (iii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

[redacted]

The petition for alien entrepreneur classification was filed on or about April 18, 1997, and was originally approved on May 27, 1997. The Associate Commissioner subsequently published four binding precedent decisions relating to this classification: Matter of Soffici, I.D. 3359 (Assoc. Comm. Ex., June 30, 1998) in June of 1998, followed by Matter of Izumii, supra, Matter of Hsiung, I.D. 3361 (Assoc. Comm. Ex., July 31, 1998) and Matter of Ho, I.D. 3362 (Assoc. Comm. Ex., July 31, 1998) in July of 1998. The center director reviewed her decision in light of these precedents and issued a Notice of Intent to Revoke approval and afforded the petitioner the opportunity to respond. After review of the petitioner's response, the center director revoked approval of the petition pursuant to 8 C.F.R. 205.2 on February 9, 1999. Counsel for the petitioner then filed the instant appeal.

The petitioner is a native and citizen of the People's Republic of China. Documentation in the record reflects U.S. residential addresses for the petitioner indicating that he is residing in the United States. His current immigration status, however, is unknown. The petitioner filed Form I-526, Immigrant Petition by Alien Entrepreneur, indicating that the petition is based on an investment in a new business in a targeted employment area eligible for downward adjustment of the minimum capital investment to $500,000 and indicating that the new business is a "regional center" eligible for participation in the Immigrant Investor Pilot Program. The petitioner stated that he is one investor, in a plan to recruit 90 investors, in [redacted] Partnership [redacted] or (the "Partnership"). The general partner of AELP is American Export Partners, LLC [redacted] or (the "General Partner"). The petitioner also indicated that the General Partner is itself designated as a "regional center" that is eligible to satisfy the employment creation provision by demonstrating indirect employment creation through revenues generated from increased exports.

QUALIFYING INVESTMENT OF CAPITAL

8 C.F.R. 204.6(e) states, in pertinent part, that

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. All capital shall be valued at fair market value in United States dollars.
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> *Commercial enterprise* means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding

company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of a holding company and its wholly-owned subsidiaries, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. This definition shall not include a non-commercial activity such as owning and operating a personal residence.

Invest means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

8 C.F.R. 204.6(j) states, in pertinent part, that:

(2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

(i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;

(ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices; sales receipts; and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;

(iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

(iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange

> for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or
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> (v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

The petitioner in this matter based the petition on his investment in AELP, the same enterprise and the same investment plan reviewed and rejected in the Matter of Izumii decision. The director therefore revoked the original approval of the petition as erroneous and inconsistent with the precedent. The director specifically cited in the Notice of Revocation that the petitioner had not made a qualifying investment because the claimed investment would not be substantially completed within the two-year conditional period and the provisions for guaranteed interest payments, reserve funds, set-aside funds for initial expenses of the partnership, escrow funds, an unsecured promissory note, and a redemption agreement were all disqualifying factors.

On appeal, counsel argued that the Izumii decision employed a faulty analysis and that, had the government not delayed the processing of the approved petition, the petitioner would have been adjusted to permanent residence.

As noted above, the instant petitioner was one of approximately ninety investors in [redacted] all employing the same investment structure. That plan was rejected in Izumii and published as a precedent decision. The decision is binding in all proceedings involving the same issues. 8 C.F.R. 103.3(c). While counsel challenged the reasoning in Izumii, he made no argument that this case did not involve the same issues. The investment plan of AELP was specifically rejected in Matter of Izumii and that decision is binding on all Service officers in the administration of the Act. Id. Therefore, the center director's decision finding that the petitioner had not made a qualifying at-risk investment of the requisite amount of capital must be affirmed.

SOURCE OF FUNDS

8 C.F.R. 204.6(j) states, in pertinent part, that:

> (3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:

[redacted]

(i) Foreign business registration records;

(ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;

(iii) Evidence identifying any other source(s) of capital; or

(iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

Relying on Matter of Soffici, supra, the director also found that the petitioner had failed to document the path of the funds he identified as his investment capital and therefore failed to establish that the funds were derived from a lawful source. The director found that merely claiming that the petitioner was a successful business person and submitting copies of bank statements was insufficient to meet the burden of proof.

On appeal, counsel argued, in pertinent part, that:

> There is no need for the INS to be overbearing or overreaching in requiring proof of lawful source of funds. Although the regulations clearly require documentary evidence that the invested funds be lawfully obtained, they do not stipulate what specific documentation must be submitted.
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> * * *
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> Mr. Feng's burden is not "proof beyond a reasonable doubt." This is not a criminal trial. Mr. Feng has complied with the regulations (and the case law found in Treasure Craft) in that he has provided supporting documentation that he is engaged in lawful business activities; he has no criminal record; he is an accomplished businessman and investor; and, that he has earned funds in a lawful manner and in a sufficient amount to allow him to make this investment.

> The I-526 petition inquiry regarding lawful source of funds should end at that point. Further inquiry regarding the lawful source of the investor's funds is best handled by the U.S. Department of State consular post abroad in the investor's home country.

In this case, the petitioner claimed to have been employed as a sales supervisor at the Hong Kong office of a multinational company. He submitted statements from four foreign bank accounts reflecting a total balance of $382,110 and submitted documentation indicating his ownership of foreign property valued at $190,476. Regarding the initial deposit of $120,000, the petitioner submitted a letter dated March 10, 1997, from [redacted] Beverly Hills, California, addressed to the petitioner stating that "your funds" have been received and deposited into the "Investment Management Account" of counsel's law firm. The letter does not identify the source of the funds or the account from which they were transferred.

As held in Matter of Izumii, the mere submission of one-time bank balance statements is insufficient to satisfy the requirements of 8 C.F.R. 204.6(j)(3). Contrary to counsel's argument, 8 C.F.R. 204.6(j)(3) requires that all petitions "must be accompanied, as applicable" by the documentation listed in the subsections. The regulation requires, in pertinent part, documentary evidence of income for the preceding five years in the form of tax returns from the jurisdiction in which they are filed. The petitioner did not submit this evidence. The burden is on the petitioner to show why his tax returns for the five years preceding filing are "not applicable" to his visa petition. Despite counsel's objections, the submission of copies of the petitioner's past tax returns is an entirely reasonable and routine requirement in employment-based visa petitions and does not appear to be too onerous a burden in this proceeding. Counsel offered no reason why the petitioner's tax returns are not applicable or are somehow unavailable. Nor did counsel submit any corroborative documentation such as confirmation of the petitioner's length of employment and proof of salary with the multinational company. Therefore, it cannot be concluded that the petitioner satisfied the regulatory requirements.

Clearly, merely declaring that one has been lawfully employed or has been successful in business ventures is not sufficient to satisfy the petitioner's burden of proof under the standard set forth in Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). The unsupported assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Laureano, 19 I&N Dec. 1, 3 (BIA 1983); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner submitted no proof of his income for the five-year period preceding filing and no documentation of his general claim of having been a "successful investor." In addition, the

petitioner submitted no proof of the actual source of the initial $120,000 transferred to the escrow account managed by counsel, despite this having been specifically cited by the director in her decision. Therefore, it must be concluded that the petitioner has not satisfied the regulatory requirements and has failed to overcome the director's objection.

Counsel's final argument that the Service should relinquish its responsibility to adjudicate the I-526 petition and delegate that responsibility to the foreign U.S. consular office is entirely without merit. The jurisdiction of the Departments of Justice and State relative to visa processing are established by statute. The Service does not have the discretion to abdicate its responsibility to adjudicate the instant visa petition or to relinquish that authority to another governmental body.

ADDITIONAL GROUNDS

While not discussed in the notice of revocation, administrative notice is made that the Associate Commissioner also held in Matter of Izumii that investments in AELP were not qualifying for alien entrepreneur classification on several other grounds.

AELP did not establish that it was primarily doing business in a targeted employment area and was ineligible for the reduced capital investment of $500,000. It was also ineligible to claim indirect employment creation under the pilot program because the job creating businesses were not within a regional center. Having found that the enterprise did not qualify for the indirect employment exception, it was also noted that the enterprise was unable to satisfy the statutory employment creation requirement through direct employment creation. It was also held that the investors were not present at the creation of AELP and had no hand in its creation and thereby failed to satisfy the statutory requirement of having invested in a new commercial enterprise that they had established. The petitioner in this matter is also ineligible for alien entrepreneur classification on these additional grounds.

The burden of proof in these proceedings rests solely with the petitioner. § 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.